No. 06-280

IN THE

Supreme Court of the United States

COUNTY OF VENTURA,

Petitioner,

v.

NOELLE WAY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The petition for certiorari lists five questions presented in this case. Respondent respectfully suggests that these five questions are properly reduced to one:

May county jail officials, consistent with the Fourth Amendment, conduct a visual body-cavity strip search of a person arrested on a misdemeanor charge of being under the influence of a controlled substance, pursuant to a blanket county policy requiring that such searches be conducted on all persons arrested on such a charge, in the absence of reasonable suspicion that the individual arrestee is concealing weapons or contraband in her body cavities and without regard to whether the arrestee will enter the general jail population.

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RESPONDENT'S BRIEF IN OPPOSITION

Although petitioner County of Ventura contends that this case presents multiple questions, only a single question is in fact presented here: whether the County violated the Fourth Amendment when it subjected respondent Noelle Way to an invasive visual body-cavity search, pursuant to a blanket county policy of conducting such searches on every person arrested on a misdemeanor charge of being under the influence of a controlled substance, regardless of the circumstances. Here, that blanket policy was applied to Way without a reasonable suspicion that she had hidden weapons or contraband in her body cavities and even though she was released on bail and never entered the general jail population. Based on the factual record before it, the court of appeals, in a unanimous opinion by Judge Pamela Rymer, agreed with the district court that the policy was unconstitutional because jail officials "failed to show any link between their blanket strip search policy and legitimate security concerns for detainees such as Way." Pet. App. 12a. The court of appeals' opinion was measured and narrow, deciding the validity only of the county policy before it, acknowledging that officers may conduct visual body-cavity searches when they have a reasonable suspicion that an arrestee is harboring weapons or contraband on her person and declining to rule out the possibility that other types of charges could support an across-the-board body-cavity search policy. *Id.* at 13a-14a & n.4.

The Ninth Circuit's conclusion here was consistent with that of the only other court of appeals to have decided the same question, *see Foote v. Spiegel,* 118 F.3d 1416 (10th Cir. 1997); *see also Cottrell v. Kaysville City,* 994 F.2d 730 (10th Cir. 1993), and was faithful to the principles established by this Court in *Bell v. Wolfish,* 441 U.S. 520 (1979). Its decision creates no conflict among the courts of appeals. Indeed, the circuits have been remarkably consistent in their approach to constitutional challenges to strip and visual body-cavity searches conducted on newly arrested pretrial detainees.

Even if the question whether a person arrested for being under the influence could be subjected to a visual body-cavity search without a reasonable suspicion that she was concealing contraband or weapons on her person merited review, this case would not be an appropriate vehicle for deciding it because Ventura County made virtually no record in the district court justifying its policy—a serious omission emphasized by both the district court and the court of appeals. *See* Pet. App. 12a, 20a-21a, 33a-34a. Petitioner attempts to make up for this failing by citing events it claims occurred after the district court's ruling, Pet. 5—none of which is in the record. There is no reason for the Court to consider the validity of an indiscriminate policy of performing visual body-cavity searches on all persons arrested for misdemeanor under-the-influence charges on a poorly developed record.

STATEMENT

1. The facts are undisputed. Respondent Noelle Way was working as a bartender at the Red Cove bar on September 6, 2000 in San Buenaventura, California when she encountered Robert Ortiz, a San Buenaventura police officer. Joint Statement of Uncontroverted Facts ("Joint Stmt."), Pet. App. 26a-27a.[1] Observing that Way had dilated pupils, rapid speech and pulse rate, and a nervous attitude, Officer Ortiz arrested her at approximately 2:10 a.m. on suspicion of being under the influence of cocaine or methamphetamine, Joint Stmt., Exh. B (ER 42), a misdemeanor violation of California Health & Safety Code § 11550(a). Pet. App. 26a-27a. Officer Ortiz conceded that, from the time he met Way until she was booked at the jail, he never had a basis for believing "that she had something hidden in her personal cavities." Deposition of

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[1] The facts to which the parties stipulated, *see* Joint Stmt. (Excerpts of Record ("ER") 31-36), are reprinted in the district court's July 22, 2002 order. Pet. App. 26a-31a.

Robert Ortiz ("Ortiz Depo.") (ER 158). After taking Way to a medical center to obtain a blood sample (which later came back negative for controlled substances, Pet App. 30a), Officer Ortiz brought her to the Ventura County Sheriff's Department Pretrial Detention Facility, Pet. App. 27a, "a 24-hour fresh-intake facility" that accepts all new arrestees for booking. Declaration of Bonnie Gatling ("Gatling Decl.") (ER 64).

Approximately an hour after her arrest, Way arrived at the pretrial detention facility and was booked between 3:10 a.m. and 3:36 a.m. Pet. App. 27a, 29a. After Way arrived in the Women's Booking section, Deputy Karen Hanson performed a pat-down search, which, as the parties stipulated, did not reveal anything that would lead the deputy to believe that Way was concealing drugs or weapons on her person or in her body cavities. *Id.* at 30a. The parties also stipulated that it was the policy of the Ventura County Sheriff's Department to conduct a same-sex, visual, unclothed body-cavity search, with no touching, on every person arrested for being under the influence of a controlled substance in violation of California Health & Safety Code § 11550. *Id.*; *see also* Joint Stmt., Exh. C (ER 44-53) (written policy). The ostensible purpose of the policy was to provide facility security and ensure the health and safety of arrested individuals. Gatling Decl. (ER 63). Visual body-cavity searches were conducted at the beginning of the booking process, *id.* (ER 64), with no waiting period to see if an inmate arrested on § 11550 charges is able to post bail. Pet. App. 30a. Pursuant to that policy, Deputy Hanson performed an unclothed visual body-cavity search of Way. *Id.* at 29a-30a. The parties agree that Deputy Hanson performed the search solely because Way was arrested for violating § 11550 and that Hanson "did not have any other information leading her to believe that the plaintiff was concealing contraband in her body cavities." *Id.*

The body-cavity searches in Women's Booking were conducted in a large, closed shower-dressing area with only the arrestee and a female deputy present. The deputy would instruct the arrestee to remove her clothing, one article at a time, and place it on the bench and to remove any bandages, prosthetic devices, wigs, dental plates, and feminine hygiene articles, such as tampons or feminine protection napkins. Declaration of Karen Hanson ("Hanson Decl.") (ER 69-70). After the arrestee removed all of her clothing, she would be visually searched. During this process, the deputy would direct the arrestee to bend forward, spread her buttocks, and cough in order to allow the deputy to inspect the arrestee's anal area. The deputy also would instruct the arrestee to spread her labia to allow a visual check of the vaginal area. As the arrestee removed each article of clothing, the deputy would search it and return it to the arrestee. *Id.* (ER 70). During Noelle Way's body-cavity search, Hanson observed that Way was using a tampon and required her to remove, tear, and discard the tampon in a nearby wastebasket. Pet. App. 29a. The search of Way did not yield any contraband, weapons, or drugs hidden on her person or in her body cavities. *Id.* at 30a.

After the search, the arrestee would get dressed and be placed into a booking cell to complete the booking process, make telephone calls, etc. Although Way was joined by a few other arrestees in her booking cell while she awaited payment of her bail, Deposition of Noelle Way (ER 76), she posted bail and was released several hours after her arrival at the pretrial detention facility, without ever entering the general jail population. Pet. App. 8a, 14a, 36a, 37a.[2] No charges were ever filed against her. *Id.* at 30a.

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[2] Female arrestees who were not released on bail were transported off-site to the Honor Farm in Ojai, California or, if they had a medical issue, were assigned to Special Housing. Gatling Decl. (ER 65); Hanson Decl. (ER 70-71).

2. Way brought an action under 42 U.S.C. § 1983 against Ventura County, Sheriff Robert Brooks, and Deputy Hanson in the Central District of California, alleging that they violated her rights under the Fourth and Fourteenth Amendments by subjecting her to a visual body-cavity search following her arrest.[3] After briefing on cross-motions for summary judgment, the district court held that the search was unreasonable and violated the Fourth Amendment. Pet. App. 32a-37a. The district court later denied qualified immunity to the individual defendants. District Court Order (Feb. 18, 2004) (ER 320-28).

The Ninth Circuit affirmed the district court's conclusion that the body-cavity search of Way violated the Fourth Amendment. Balancing "the need for the particular search against the invasion of personal rights that the search entails," Pet. App. 11a (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)), the court of appeals held that the defendants "failed to show any link between their blanket strip search policy and legitimate security concerns for detainees such as Way." *Id.* at 12a. The court emphasized that the defendants "made only a conclusory submission that the purpose of the search protocol is 'to provide facility security and to ensure the inmate's health and safety,' and that inmates have 'sometimes' ingested drugs to evade detection." *Id.* In effect, the court found that the County asked it "to take security implications on faith." *Id.*

Furthermore, the court rejected the County's assertion that the charge of being under the influence of a drug necessarily poses a threat that the arrestee will conceal additional drugs in jail during the limited time between booking and bail, or booking and placement in the general population. Pet. App. 13a. In the absence of such a threat, "it was unreasonable to

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[3] Respondent also named Officer Ortiz as a defendant, but only in connection to claims concerning her arrest, which are not at issue here.

assume that Way harbored drugs in some cavity or other." *Id.* at 14a. As the court observed: "Way was under the control of the arresting officer from the time she was taken into custody at work until booking. The officer perceived no indication that she was carrying drugs or contraband." *Id.* The pat-down search at the jail likewise turned up nothing. *Id.* In these circumstances, the court concluded, "an arrest for being under the influence of a drug does not supply reasonable suspicion that drugs are concealed in a body cavity." *Id.* at 15a. The court of appeals held, however, that the individual defendants were entitled to qualified immunity. *Id.* at 15a-17a; *id.* at 17a-22a (Wardlaw, J., concurring).

REASONS FOR DENYING THE WRIT

I. THERE IS NO SPLIT IN THE CIRCUITS, AND THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS.

A. There Is No Circuit Split.

The intrusive and degrading nature of an unclothed, visual body-cavity search cannot be overstated. It has been appreciated by courts across the country, which have described strip searches involving the visual inspection of the anal and genital areas as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1272 (7th Cir. 1983) (citation omitted); *see also Roberts v. Rhode Island,* 239 F.3d 107, 110 (1st Cir. 2001) (characterizing visual body-cavity searches as "an 'extreme intrusion' on personal privacy and 'an offense to the dignity of the individual'") (citation omitted); Pet. App. 11a ("The scope of the intrusion here is indisputably a 'frightening and humiliating' invasion, even when conducted 'with all due courtesy.'") (citation omitted).

In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court considered a challenge to the federally operated New York City Metropolitan Correctional Center's policy of conducting visual body-cavity searches of all pretrial detainees after contact visits with persons from outside the institution. Although the Court noted that "this practice instinctively gives us the most pause," *id.* at 558, it held that, "under the circumstances," the contact-visit search policy did not violate the Fourth Amendment. *Id.* The Court explained that the test of reasonableness under the Fourth Amendment requires "[i]n each case . . . a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559. "Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates," the Court sustained the searches without requiring probable cause. *Id.* at 560.

After *Wolfish*, the disposition by the courts of appeals of challenges to blanket policies or practices authorizing strip searches or visual body-cavity searches for broad categories of new arrestees has been remarkably uniform.[4] There has been

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[4] Applying the balancing test under *Wolfish*, the courts of appeals have consistently held policies authorizing strip searches or visual body-cavity searches for broad categories of pretrial detainees, such as all arrestees admitted to jail or all persons arrested for felonies, without reasonable suspicion that the individual arrestee is concealing weapons or contraband, unreasonable under the Fourth Amendment. *See, e.g., Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001); *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001); *Roberts*, 239 F.3d 107; *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000); *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702 (9th Cir. 1989); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), (continued...)

very little case law, however, addressing blanket policies authorizing such intrusive searches based solely on the fact of an arrest on a charge of being under the influence of an unlawful drug. There is no split in the circuits on the question presented. To the best of counsel's knowledge, only one other court of appeals, the Tenth Circuit, has addressed whether an arrest for being under the influence of a controlled substance—without something more—provides a sufficient basis for conducting a strip search or visual body-cavity search, and that court held, in agreement with the Ninth Circuit, that it does not.

In *Foote v. Spiegel,* 118 F.3d 1416 (10th Cir. 1997), Kristin Foote was arrested on suspicion of driving while under the influence of marijuana. *Id.* at 1420. As was true here, there was no particular reason to suspect Foote of hiding drugs on her person; rather, she was strip searched at the county jail pursuant to a jail practice of strip searching all persons arrested on drug-related charges. *Id.* at 1421, 1425. Also like respondent, Foote was released on bond and was never placed in the general jail population. *Id.* Relying on its earlier decision in *Cottrell v. Kaysville City,* 994 F.2d 730, 734 (10th Cir. 1993), which held unconstitutional a county jail's policy of

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[4](...continued)
overruled in part on other grounds, Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999); *Stewart v. Lubbock County,* 767 F.2d 153 (5th Cir. 1985); *Mary Beth G.,* 723 F.2d 1263; *Logan v. Shealy,* 660 F.2d 1007 (4th Cir. 1981). The Ninth Circuit and others have explained that reasonable suspicion may be based on such factors as "the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record." *Giles,* 746 F.2d at 617; *accord Kraushaar v. Flanigan,* 45 F.3d 1040, 1045 (7th Cir. 1995); *Kelly v. Foti,* 77 F.3d 819, 821 (5th Cir. 1996); *see also Weber,* 804 F.2d at 802 (considerations giving rise to reasonable suspicion include "the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest").

conducting strip searches of all persons arrested on drug-related charges, the Tenth Circuit explained that "[p]robable cause to believe a person was driving while under the influence of drugs does not establish reasonable suspicion that such person has drugs that can only be found by a strip search." *Foote,* 118 F.3d at 1423. The court found that "[t]he belief that Foote had drugs hidden in a body cavity because she was suspected of driving while under the influence of drugs, when no drugs had been found in her vehicle, on her passenger, or in a pat-down search, was unreasonable." *Id.* at 1426. The little other case law addressing this and similar issues is in accord. *See Swain v. Spinney,* 117 F.3d 1, 9 (1st Cir. 1997) (arrest for possession of small quantity of marijuana insufficient to render a strip and visual body-cavity search reasonable); *Dodge v. County of Orange,* 209 F.R.D. 65, 76-77 (S.D.N.Y. 2002) (ruling at the preliminary injunction stage that the appearance of being under the influence of alcohol or drugs alone is insufficient to justify a strip search); *cf. Logan,* 660 F.2d at 1013 (strip search of person arrested for driving while intoxicated "bore no . . . discernible relationship to security needs at the Detention Center"); *accord Stewart,* 767 F.2d at 155-57.

Petitioner implies, however, that the Ninth Circuit's approach to analyzing the validity of Ventura County's body-cavity search policy differs from that of other circuits, and it declares that "[t]here has been a strong predisposition in the circuits over the last two decades to equate the probable cause to arrest for charges relating to drugs, violence, or weapons with the lower informational level of reasonable suspicion" sufficient to allow a visual body-cavity search. Pet. 9. That proclamation distorts the state of the law. As discussed above, the circuits overwhelmingly have agreed that sweeping county jail policies authorizing strip or body-cavity searches for broad categories of fresh arrestees, in the absence of individualized reasonable suspicion that an arrestee is secreting contraband or weapons on her person, are unreasonable under the Fourth

Amendment. Petitioner does not cite a single case that is on point, in which a court of appeals has sustained a blanket policy allowing strip searches of all persons arrested for being under the influence of a drug (or even of all persons arrested for some other type of drug offense). The dearth of cases addressing this issue is reason alone for this Court to deny certiorari.

The smattering of circuit cases cited by the petitioner at Pet. 7-10 are inapposite and, in any event, do not follow an approach any different from that of the Ninth Circuit. In *Watt v. City of Richardson Police Department,* 849 F.2d 195 (5th Cir. 1988), *cited in* Pet. 9, the Fifth Circuit never addressed what types of charges might alone justify a strip search because there the court held unconstitutional a strip search of a woman who had been convicted more than 10 years earlier of a minor drug offense and was now arrested for failure to license her dog. *Watt,* 849 F.2d at 196. The court noted in dicta that the plaintiff did not challenge the propriety of strip searches "conducted prior to incarceration on charges of narcotics, shoplifting or weapons violations" and that such a challenge would be "fruitless," *id.* at 197, but the court never had an opportunity to address what types of "narcotics" charges might justify such a search because the question was not presented. Even as dicta, the above statement in *Watt* does not apply here because Noelle Way was never incarcerated.

The Seventh Circuit's decision in *Kraushaar v. Flanigan,* 45 F.3d 1040 (7th Cir. 1995), *cited in* Pet. 10, is equally inapplicable. Petitioner quotes language from the opinion about a pat-down search not necessarily revealing small items such as "several hits of LSD on postage stamps, a small rock of crack cocaine, or a razor blade," 45 F.3d at 1046, leaving the impression that the Seventh Circuit held that routine strip searches are acceptable to compensate for deficiencies in pat-down searches. But the court of appeals in *Kraushaar* upheld a strip search only because the plaintiff's arrest for driving under the influence was coupled with furtive hand movements

suggesting that the plaintiff was attempting to hide something in his pants, thereby giving the arresting officer a reasonable suspicion that the arrestee had hidden contraband in his pants and a justification for conducting a more intrusive search. *Id.* Ninth Circuit law, like that of all other circuits to have addressed the issue, is equally clear that a strip search may be conducted if an officer has a reasonable suspicion that a particular arrestee is carrying or concealing contraband on her person. *See, e.g., Giles,* 746 F.2d at 615, 617-18. Here, however, the parties have stipulated that the arresting and jail officers *lacked* reasonable suspicion to believe that Way had hidden contraband on her person or in her body cavities.

The Sixth Circuit's decision in *Dufrin v. Spreen,* 712 F.2d 1084 (6th Cir. 1983), *cited in* Pet. 9-10, is also distinguishable. There, the court upheld a strip search of a woman arrested for a felony violent assault where, given jail conditions, "she would ultimately come into contact with the general jail population." 712 F.2d at 1087. Leaving aside the question whether felony violent offense charges present potentially more serious security concerns than other, less serious charges (such as misdemeanor under-the-influence charges), as *Dufrin* and other decisions have suggested, these courts sustained the strip searches because of the combination of the danger indicated by a charge of committing a violent crime and the inmate's expected entry into the general jail population. *See id.* at 1087, 1089; *see also Hicks v. Moore,* 422 F.3d 1246, 1248, 1251-52 (11th Cir. 2005) (holding that plaintiff's strip search could not be justified based only upon her impending placement in the general jail population, but was reasonable because her arrest for family violence battery evoked reasonable suspicion that she might be concealing weapons or contraband), *cited in* Pet. 7-9; *Thompson v. City of Los Angeles,* 885 F.2d 1439, 1447 (9th Cir. 1989) (upholding strip search of arrestee upon entering jail population because his offense of grand theft auto was sufficiently associated with violence to justify a visual strip

search), *cited in* Pet. 10; *cf. Block v. Rutherford*, 468 U.S. 576, 583 (1984) ("The very fact of nonrelease pending trial . . . is a significant factor bearing on the security measures that are imperative to proper administration of a detention facility.").

Here, by contrast, as both the court of appeals and district court pointed out, respondent Way posted bail not long after her arrest, and there was no evidence that she was ever housed with (or expected to be housed with) the general jail population. Pet. App. 8a, 14a, 36a, 37a. Moreover, the Ninth Circuit's holding here was quite narrow, expressly reserving judgment on whether other types of drug charges alone might give rise to reasonable suspicion to conduct a visual body-cavity search. *Id.* at 13a-14a & n.4.

Petitioner emphasizes the Eleventh Circuit's decision in *Hicks* as evidence of a circuit conflict, but as noted above, *Hicks* is inapposite because the court's decision to uphold the strip search was based on the fact that a detainee who was to be placed in the jail's general population had been arrested for a crime of violence. *Hicks*, 422 F.3d at 1251-52. Petitioner tries to transform *Hicks* into a more significant ruling by pointing out that the authors of the *Hicks* opinion "personally question[ed]" whether it would violate the Fourth Amendment for a county jail to strip search "every detainee who was to be placed in the general population of the Jail." *Id.* at 1251 & n.5; *see* Pet. 8. The *Hicks* panel acknowledged, however, that the law of the Eleventh Circuit is that reasonable suspicion is required, *Hicks*, 422 F.3d at 1251 n.5; *e.g.*, *Wilson*, 251 F.3d at 1343, and it reaffirmed that, under Eleventh Circuit law, the strip search could not be justified on the single ground that the plaintiff was about to enter the jail's general population. *Hicks*, 422 F.3d at 1248, 1251 n.5. Petitioner's grasping at a disagreement in personal views of judges in another circuit—on a question not even presented by this petition—only reinforces just how unworthy this particular case is of further review. Moreover, because Way posted bail and never entered the

general jail population, the personal disagreement within the Eleventh Circuit is irrelevant to this case.[5]

B. The Court Of Appeals' Decision Is Consistent With *Bell v. Wolfish.*

Petitioner also argues that the court of appeals' decision conflicts with this Court's decision in *Bell v. Wolfish*, upholding visual strip searches of all inmates who had contact visits with visitors from outside the institution. Pet. 11-13. The County claims that "being under the influence of a mind-altering substance says as much, if not a great deal more than a contact visit, about the lengths to which an arrestee will go to hide paraphernalia and drugs." *Id.* at 11. Tellingly, petitioner cites no court decision that has agreed with its position. In any event, the issue is not worthy of this Court's review.

First, the court of appeals correctly stated the analysis required by *Wolfish*: that the court must "balanc[e] 'the need for the particular search against the invasion of personal rights that the search entails.'" That "requires us to weigh 'the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'" Pet. App. 11a (quoting *Wolfish*, 441 U.S. at 559). As this Court's rules reflect, a petition for certiorari is rarely granted when the asserted error consists of "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Second, in finding no justification for the County's visual body-cavity search policy, the court of appeals relied on the

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[5] Although the question is not presented here, the circuits generally have agreed that entry into or intermingling with the general jail population, without more, is insufficient grounds to justify a strip or visual body-cavity search. *See, e.g., Roberts*, 239 F.3d at 112-13; *Kelly*, 77 F.3d at 822; *Masters*, 872 F.2d at 1254; *Weber*, 804 F.2d at 801-02; *Giles*, 746 F.2d at 618-19; *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984).

factual record before it. In *Wolfish*, this Court emphasized that the record reflected that visual cavity searches after contact visits were necessary not only to discover but to deter the smuggling of weapons, drugs, and other contraband into the institution, 441 U.S. at 558, and that such smuggling efforts were documented not only in the record, but in other court decisions as well. *Id.* at 559. By contrast, the premise of Ventura County's policy—that people arrested for being under the influence of an illegal drug are likely to conceal drugs in their body orifices—was not documented in this case, or in any others, for that matter. The court of appeals was left to balance the "'frightening and humiliating' invasion" of personal rights that accompanied visual body-cavity searches, Pet. App. 11a, against the jail's rote invocation of security concerns, unsupported by "any link between [the County's] blanket strip search policy and legitimate security concerns for detainees such as Way." *Id.* at 12a; *see also id.* at 17a.

Petitioner protests that the Ninth Circuit demanded a "track record of disaster" to justify the County's blanket policy. Pet. i, 6, 15, 19. That is not correct. The court of appeals simply declined "to take security implications on faith." Pet. App. 12a. As the court explained, the defendants "made only a conclusory submission" in the district court "that the purpose of the search protocol is 'to provide facility security and to ensure the inmate's health and safety,' and that inmates have 'sometimes' ingested drugs to evade detection." *Id.*; *see also id.* at 21a (Wardlaw, J., concurring) ("no documentation of security concerns in this case"). Likewise, the district court found wanting defendants' conclusory submission that the sweeping body-cavity searches were necessary to promote security or to prevent inmates from ingesting drugs or their containers (*e.g.*, balloons), emphasizing that defendants provided "no evidence regarding whether these inmates were charged with violating Health and Safety Code Section 11550" or whether visual, unclothed body-cavity searches of pretrial detainees charged

with violating § 11550 "have resulted in the discovery of concealed drugs or contraband or prevented injury to the detainees." Pet. App. 34a; *see also id.* at 13a.[6]

Petitioner's reliance on *Bell v. Wolfish* ultimately rests on various unsupported assertions by the County about why it is reasonable to believe that individuals who are under the influence of an illegal drug routinely hide drugs in their body cavities. *See, e.g.*, Pet. 12 ("Upon realizing that an encounter with the law is imminent, only a fool would fail to quickly secrete the narcotics or paraphernalia in the most readily accessible and least detectible locations."); *id.* ("While hiding objects in body cavities is not sane practice, fear of brutal retribution is the mother of invention."). These various assertions are unfounded—which is why petitioner identifies no court decision that has accepted them—and are offered without citation to the record or to any other authority. As the court of appeals pointed out, "Way was under the control of the arresting officer from the time she was taken into custody at work until booking." Pet. App. 14a. A pat-down search upon

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[6] Petitioner's fourth question presented asks whether this Court's holding in *Schmerber v. California*, 384 U.S. 757 (1966), that probable cause to arrest for intoxication permits the state to force an arrestee to have blood drawn, implies that jail personnel processing a drug-intoxicated suspect should be permitted to perform a visual body-cavity search. Pet. i. This question was not presented to the lower courts and should not be considered by this Court. The purpose of the blood test in *Schmerber* was to search for evidence of a crime, whereas here, the County argued to the district court and the Ninth Circuit that the body-cavity search was necessary for security purposes and the protection of arrestees—*not* for investigative purposes. *See, e.g.*, Gatling Decl. (ER 63) ("The entire purpose of the procedure is to provide facility security and to ensure the inmate's health and safety, not to search for evidence of crime."); *accord* Defendants' Motion for Summary Judgment (ER 107-08); Appellants' Opening Brief at 42 n.2 (9th Cir.).

her arrival at Women's Booking at the jail likewise turned up nothing. *Id.* Way was subjected to the body-cavity search almost immediately thereafter, before she was exposed to other inmates. The only way arrestees like respondent could be concealing drugs in body cavities would be if they hid drugs there before ever having their encounters with law enforcement. But to assume that persons under the influence of drugs, who have no expectation of having such an encounter, conceal drugs in their body orifices is patently unreasonable. The Tenth Circuit put it well:

> [B]ecause Foote had no opportunity to hide anything beneath her clothing after Howe had stopped her vehicle and a thorough pat-down search at the jail had revealed no drugs, the strip search could be justified only if it were reasonable to believe persons driving while under the influence of marijuana, who have no particular reason to expect they will be searched, routinely carry a personal stash in a body cavity. That belief is unreasonable.

Foote, 118 F.3d at 1426.

Because of the unexpected nature of an arrest for being under the influence of a drug, the deterrence rationale articulated in *Wolfish*, 441 U.S. at 559, is inapposite, as the court of appeals found. *See* Pet. App. 12a ("Nor did [the County] adduce evidence of any deterrent effect on persons such as Way who are spontaneously arrested and detained temporarily at the facility for being under the influence."). Several courts of appeals have made the same observation about deterrence in the context of strip searches of new arrestees. *See, e.g., Shain*, 273 F.3d at 64 ("Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something."); *Roberts*, 239 F.3d at 111 ("[T]he deterrent rationale for the *Bell* search is simply less

relevant given the essentially unplanned nature of an arrest and subsequent incarceration."); *Jones v. Edwards,* 770 F.2d 739, 741 (8th Cir. 1985) (that officers were with the arrestee every moment after they read him the warrant "eliminat[ed] any chance that he might have secreted a weapon on his person"). As the Ninth Circuit elaborated in a previous decision: "Visitors to the detention facility in *Bell* could plan their visits and organize their smuggling activities. In contrast, arrest and confinement in the Bonneville County Jail are unplanned events, so the policy could not possibly deter arrestees from carrying contraband." *Giles,* 746 F.2d at 617.

Evidently realizing that it failed to make any record justifying its blanket policy, petitioner cites events it claims occurred *after* the district court's ruling, Pet. 5—none of which is in the record. The County's persistence in citing difficulties it has purportedly encountered *after* declaring a moratorium on its search policy (and it is unknown whether any of the cited incidents has anything to do with arrests for being under the influence) is remarkable given that it attempted the same tactic without success in the Ninth Circuit. The court of appeals pointed out that the County's counsel had claimed during oral argument that the jail "had experienced difficulties" since the district court's ruling, but that "the record contains no evidence of whatever they might be." Pet. App. 12a (n.3).

Thus, given the lack of a developed record justifying the County's body-cavity search policy, this Court should deny the writ of certiorari even if the question presented here merited review because this case is a poor vehicle for deciding it.

II. THE CONSTITUTIONALITY OF CALIFORNIA'S STRIP-SEARCH STATUTE WAS NOT CHALLENGED OR ADDRESSED BELOW.

Petitioner attempts to make the Ninth Circuit's decision appear more consequential than it is by implying that the court of appeals implicitly struck down a California statute, Cal.

Penal Code § 4030, governing strip and body-cavity searches. Pet. i, 17-19. That statute exempts offenses "involving weapons, controlled substances or violence" from its general prohibition on conducting strip searches or visual body-cavity searches on persons arrested for misdemeanor or infraction offenses "prior to placement in the general jail population." Cal. Penal Code § 4030(f). Although the Ventura County policy of subjecting all persons arrested for being under the influence of a controlled substance to visual body-cavity searches may not violate the state statute, neither is it compelled by the statute. The California statute does not require the County to conduct any such search, and therefore says nothing about the legitimacy of the County's across-the-board suspicionless visual body-cavity search policy. The statute likewise does not address visual body-cavity searches such as this one, which involved an arrestee who was *not* about to be placed in the general jail population. In any event, Way argued that the County had improperly construed the California statute, but she did not challenge, and the lower courts did not address, its constitutionality. Thus, its validity is not before this Court.

III. THE POLICY ARGUMENTS PRESENTED IN THE PETITION LIKEWISE DO NOT MERIT FURTHER REVIEW.

Finally, petitioner makes various policy arguments to encourage this Court to grant certiorari, none of which warrants further review. Petitioner's main complaint is that the Ninth Circuit did not address questions not before it, such as whether it would be permissible under the Fourth Amendment to conduct strip searches on new arrestees if the drug charges had been different. Pet. 6, 14-15, 19. Far from being a deficiency, the measured and narrow nature of the court of appeals' decision commends it. The court left for another day such questions as whether a charge for drug possession would be sufficient or whether possession for sale would be required, *id.*

at 14—questions not presented by this case. *See United States Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993) (federal courts lack power to render advisory opinions); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). Essentially, petitioner protests that the Ninth Circuit's reservation of judgment on whether an appropriately tailored prophylactic body-cavity search policy might survive Fourth Amendment scrutiny, while otherwise requiring individualized suspicion that an arrestee is concealing contraband or weapons on her person, does not provide the County with sufficient guidance and leaves it exposed to liability. Pet. 6, 14-16.[7]

Short of issuing an advisory opinion, however, neither the Ninth Circuit nor any other court can address situations not before it. Moreover, as this Court recognized in *Wolfish*: "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." 441 U.S. at 559; *see also Sokolow*, 490 U.S. at 7 ("The concept

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[7] Petitioner characterizes the court of appeals' opinion as approaching imposing a requirement of "the demonstration of individualized probable cause" to believe that a new arrestee is concealing drugs or drug paraphernalia, Pet. 6, but that is an incorrect reading of the opinion. In keeping with the view of other circuits to have addressed the matter, *see supra* n.4, the court of appeals requires a showing of reasonable suspicion—*not* probable cause—to conduct a strip search and has suggested that, in appropriate cases, the charge itself may give rise to that reasonable suspicion. Pet. App. 13a (citing *Thompson*, 885 F.2d at 1447). As this Court has often recognized, the Fourth Amendment's "reasonable suspicion" requirement of "some minimal level of objective justification" is "obviously less demanding" than what is required for probable cause. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989); *accord Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

of reasonable suspicion . . . is not 'readily, or even usefully reduced to a neat set of legal rules.'") (citation omitted); *accord Ornelas v. United States,* 517 U.S. 690, 696 (1996) (reasonable suspicion and probable cause standards "are not 'finely-tuned standards'" but are instead "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed").

Petitioner says it wants to limit its potential litigation liability, but this is not a case in which a jail official authorized a visual body-cavity search based upon a reasonable suspicion that the arrestee was hiding contraband on her person, and a court later second-guessed that judgment. By adopting a policy authorizing the indiscriminate conduct of intrusive, humiliating, and degrading visual body-cavity searches based only on the fact of a misdemeanor charge of being under the influence of a drug, Ventura County led with its chin, given the strong consensus of circuits across the county that blanket strip search policies governing new arrestees rarely (if ever) pass Fourth Amendment muster. A more nuanced approach authorizing such searches only when the arresting officer or jail personnel has a reasonable suspicion to believe that the arrestee is concealing drugs or weapons on her person---or at least limiting such searches to a narrower category of offenses that the County can actually link to genuine security concerns—would not only safeguard Fourth Amendment rights, but would insulate the County from liability for all but the most egregious abuses, given that the County cannot be held liable on a respondeat superior theory. *Monell v. Dep't of Social Servs. of New York,* 436 U.S. 658, 691 (1978); *e.g., Abshire v. Walls,* 830 F.2d 1277, 1280, 1282 (4th Cir. 1987) (affirming grant of summary judgment in favor of County, despite jury verdict that plaintiff had been subjected to an unreasonable strip search, because the County's strip search policy required specific factors to be present that established a reasonable belief that the search would uncover a weapon or a controlled

substance, satisfying constitutional standards); *Beasley v. City of Sugar Land,* 410 F. Supp. 2d 524, 528-29 (S.D. Tex. 2006) (granting city's motion for summary judgment, despite fact that a strip search occurring under the alleged circumstances would violate the Fourth Amendment, because the city's policy constitutionally authorized strip searches only when the officer had a reasonable suspicion that an individual posed a threat to facility security). Way is aware of no case law—and petitioner cites none—supporting petitioner's farfetched claim that the County can be held liable for *failing* to conduct a visual body-cavity search if an arrestee, without the County's knowledge, has concealed contraband in a body cavity and then harms herself with it. Pet. 16-17.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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